Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-35-1992
ABDUL MALIK ISHAK J
31 MARCH 1995

Public Servants *— Dismissal — Binding over order made in criminal proceedings — Whether can be construed as a conviction — Criminal Procedure Code (FMS Cap 6) s 173A(ii)(b) — Public Officers (Conduct and Discipline) Chapter 'D' General Orders 1980 orders 3, 33 & 35*

Public Servants *— Dismissal — Dismissal of teacher following finding of guilt on criminal charge — No reasonable right to be heard given — Whether dismissal valid — Federal Constitution art 135(2) proviso*

Labour Law *— Employment — Dismissal — Teacher found guilty on criminal charge — Binding over order made — Whether dismissal valid — Whether binding over order can be construed as a conviction — Criminal Procedure Code (FMS Cap 6) s 173A(ii)(b) — Public Officers (Conduct and Discipline) Chapter 'D' General Orders 1980 orders 3, 33 & 35*

The plaintiff, a senior assistant of a primary school, was arrested and charged with two counts of criminal breach of trust by a public servant under s 409 of the Penal Code (FMS Cap 45). The sessions court convicted the plaintiff and sentenced him to six months' imprisonment. On appeal, the High Court bound over the plaintiff conditionally upon his entering into a bond to be of good behaviour for a period of three years under s 173A(ii)(b) of the Criminal Procedure Code (FMS Cap 6) ('the CPC') in the sum of RM5,000 without sureties. The defendant, the Education Service Commission ('the Commission'), then decided to dismiss the plaintiff because 'with the said conviction, [the plaintiff] had lowered the reputation of the civil service', an offence under para 4(2)(d) of the Public Officers (Conduct and Discipline) Chapter 'D' General Orders 1980 ('the GO'). The dismissal was effected under orders 33 and 35(1) of the GO. The plaintiff subsequently wrote to the Commission asking for a lesser punishment but the Commission confirmed that its decision was final. The plaintiff insituted this action which questioned the validity of his dismissal. The sole question to be decided was whether the binding over order made by the High Court under s 173A(ii)(b) of the CPC could be construed as a 'conviction' under orders 3, 33 and 35 of the GO.

Held, dismissing the plaintiff's claim:

(1) The word 'conviction' is not defined in the CPC but is defined in order 3 of the GO to include 'a finding or an order involving a finding of guilt by a criminal court in Malaysia'.

(2) While no conviction is recorded when a court orders a binding over under s 173A(ii)(b) of the CPC, the court before so ordering must first find that the charge has been proved. Since the court must first find that the charged has been proved, that would necessarily mean that there must also be a concurrent finding of guilt, which fell within the ambit of the definition of 'conviction' in order 3 of the GO. Consequently, the Commission was correct when deciding to dismiss the plaintiff under orders 33 and 35 of the GO.

(3) No objection could be taken against the words 'with the said conviction' used by the Commission because once the court found that the charge against the plaintiff had been proved, the Commission was entitled to proceed under orders 33 and 35 of the GO to order the plaintiff's dismissal. There appeared to be no necessity for the court to record a conviction before the plaintiff could be dismissed on the ground of conduct in respect of which a criminal charge had been proved or for conducting himself in such manner as to bring the public service into disrepute or to bring discredit thereto.

(4) By virtue of the proviso to art 135(2) of the Federal Constitution, the fact that the plaintiff was not given a reasonable opportunity of being heard was of no consequence as he had been dismissed on the ground of conduct in respect of which a criminal charge had been proved.

[Bahasa Malaysia summary

Plaintif, seorang penolong kanan di sebuah sekolah rendah, telah ditangkap dan dituduh atas dua tuduhan pecah amanah jenayah oleh seorang pegawai awam di bawah s 409 Kanun Keseksaan (NMB Bab 45). Mahkamah sesyen telah mensabitkan plaintif dan menjatuhkan hukuman penjara enam bulan ke atasnya. Atas rayuan, Mahkamah Tinggi telah melepaskan plaintif atas syarat beliau diikat jamin selama tiga tahun di bawah s 173A(ii)(b) Kanun Acara Jenayah (NMB Bab 6) ('KAJ') untuk jumlah RM5,000 tanpa penjamin. Defendan, iaitu Suruhanjaya Perkhidmatan Pendidikan ('Suruhanjaya itu'), kemudiannya membuat keputusan untuk memecat plaintif kerana 'dengan sabitan tersebut, [plaintif] telah menjatuhkan reputasi perkhidmatan awam', satu kesalahan di bawah perintah 4(2)(d) Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) Bab 'D' 1980 ('Perintah itu'). Pemecatan itu telah dijalankan di bawah perintah 33 dan 35(1) Perintah itu. Berikutan daripada itu, plaintif telah menulis kepada Suruhanjaya itu untuk memohon agar hukumannya itu dapat diringankan tetapi Suruhanjaya itu menekankan bahawa keputusannya itu adalah muktamad. Plaintif memulakan tindakan ini yang mempersoalkan keesahan pemecatannya itu. Soalan tunggal yang harus diputuskan adalah sama ada perintah

pelepasan yang dibuat oleh Mahkamah Tinggi di bawah s 173A(ii)(b) KAJ boleh ditafsirkan sebagai satu 'sabitan' di bawah perintah 3, 33 dan 35 Perintah itu.

Diputuskan, menolak tuntutan plaintif itu:

(1) Perkataan 'sabitan' tidak ditakrifkan di dalam KAJ tetapi ianya ditakrifkan di dalam perintah 3 Perintah itu sebagai merangkumi 'suatu dapatan atau suatu perintah yang melibatkan suatu dapatan bersalah oleh sesuatu mahkamah jenayah di Malaysia'.

(2) Sedangkan tiada sabitan direkodkan apabila sesebuah mahkamah membuat perintah pelepasan di bawah s 173A(ii)(b) KAJ, sebelum mahkamah membuat perintah sedemikian ianya mestilah terlebih dahulu mendapati bahawa tuduhan itu telah dibuktikan. Oleh kerana mahkamah mesti terlebih dahulu mendapati bahawa tuduhan itu telah dibuktikan, itu sememangnya bermakna bahawa mestilah juga terdapat dapatan serentak tentang kesalahan, yang termasuk di dalam lingkungan takrif 'sabitan' di dalam perintah 3 Perintah itu. Dengan demikian, Suruhanjaya itu betul apabila ianya membuat keputusan untuk memecat plaintif di bawah perintah 33 dan 35 Perintah itu.

(3) Tiada bantahan yang boleh dibuat terhadap perkataan 'dengan sabitan tersebut' yang digunakan oleh Suruhanjaya itu kerana sebaik sahaja mahkamah mendapati bahawa tuduhan terhadap plaintif itu telah dibuktikan, Suruhanjaya itu berhak bertindak di bawah perintah 33 and 35 Perintah itu untuk mengarahkan pemecatan plaintif. Nampaknya tidak terdapat apa-apa keperluan untuk mahkamah merekodkan satu sabitan sebelum plaintif boleh dipecat atas alasan kelakuan yang mengenainya suatu pertuduhan jenayah telah dibuktikan atau kerana berkelakuan dengan sedemikian cara hingga memburukkan nama atau mencemarkan nama perkhidmatan awam.

(4) Mengikut proviso kepada perkara 135(2) Perlembagaan Persekutuan, hakikat bahawa plaintif tidak diberi peluang yang munasabah untuk didengar tidak membawa apa-apa kesan kerana beliau telah dipecat atas sebab kelakuan yang mengenainya suatu pertuduhan jenayah telah dibuktikan.]

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal vide Criminal Appeal No J–01–28–95.]

Notes

For cases on dismissal of public servants, see 10 *Mallal's Digest* (4th Ed) paras 1324–1359; [1992] Mallal's Digest 1441–1442; [1993] Mallal's Digest 1133.

For cases on dismissal from employment, see 8 *Mallal's Digest* (4th Ed) paras 512–523; [1989] Mallal's Digest 949; [1991]

Mallal's Digest 1272–1274, 1313–1315; [1992] Mallal's Digest 1151–1152.

Cases referred to

IRC v Parker [1966] AC 141; [1966] 1 ALL ER 399; [1966] 3 WLR 486 (refd)
Kirkness v John Hudson & Co Ltd [1955] AC 696; [1955] 2 All ER 345; [1955] 3 WLR 1135 (refd)
PP v Idris [1955] MLJ 34 (distd)
PP v Onn [1969] 1 MLJ 4 (distd)
PP v Yeong Yin Choy [1976] 2 MLJ 267 (distd)
R v Britton [1967] 2 QB 51; [1967] 1 All ER 486; [1967] 2 WLR 537 (refd)
Zainal bin Hashim v Mohamed Haniff bin Omar & Anor [1975] 2 MLJ 262; [1977] 2 MLJ 267 (FC); [1979] 2 MLJ 276 (PC) (folld)

Legislation referred to

Federal Constitution art 135(1), (2)(a)
Criminal Procedure Code (FMS Cap 6) s 173A(ii)(b)
Penal Code (FMS Cap 45) ss 353, 409
Public Officers (Conduct and Discipline) Chapter 'D' General Orders 1980 orders 3, 4(2)(d), 33, 35, 36

T Balaskanda (*Zaman & Associates*) for the plaintiff.
Abdul Rashid bin Hj Daud (Senior Federal Counsel) for the defendants.

Abdul Malik Ishak J: The plaintiff was the senior assistant of Sekolah Rendah Jenis Kebangsaan (Cina) Tuan Poon, Simpang Renggam (see agreed bundle marked 'B' at p 4 and compare it with the agreed bundle marked 'A' at p 6 and para 4 of the statement of claim which described the plaintiff wrongly as the headmaster of Sekolah Rendah Jenis Kebangsaan Cina, Kangkar Baru, Yong Peng). He was arrested by the Anti-Corruption Agency and charged with two counts of criminal breach of trust by a public servant under s 409 of the Penal Code (FMS Cap 45) at the Sessions Court, Muar, Johor and as a result of which he was interdicted with effect from 2 July 1988 (see agreed bundle B at p 8). On 2 July 1988, the Sessions Court, Muar, Johor convicted the plaintiff (not clear whether on one or on both counts) and sentenced him to six months' imprisonment. The plaintiff lodged an appeal and the High Court, Muar, Johor heard the appeal on 6 December 1989 and adjourned it for decision on 1 April 1990 where it gave its decision in favour of the plaintiff. The High Court, Muar, Johor bound over the plaintiff conditionally upon his entering into a bond to be of good behaviour for a period of three years under s 173A(ii)(b) of the Criminal Procedure Code (FMS Cap 6) ('the CPC') in the sum of RM5,000 without sureties.

Unfortunately, there was no written decision. Be that as it may, the State Education Director of Johor in his letter dated 10 April 1990 to the

Setiausaha Suruhanjaya Perkhidmatan Pendidikan, Kuala Lumpur recommended that the plaintiff be reduced in rank (demoted) with the consequential downgrading of his salary scheme. That letter is produced below for ease of reference:

Jabatan Pendidikan Negeri Johor
Jalan Tun Abdul Razak
80604 Johor Bahru
Johor

Sulit

Ruj tuan: SPP.z.60/1/12–43138/(30)
Ruj kami: JPNJ/FP.SULIT.68254/(95)
Tarikh: 10 April 1990

Setiausaha
Suruhanjaya Perkhidmatan Pendidikan
Tingkat 21.32 dan 33
Bangunan Menara Dato' Onn
Pusat Dagangan Dunia Putra
Jalan Tun Ismail
50526 Kuala Lumpur
(up Encik Mohd Zin Bin Ahmad)

Tuan

Tindakan tatatertib terhadap Encik Tan Chee Meng @ Tan Tek Seng pegawai perkhidmatan pendidikan kategori B1 (ditempatkan khas untuk penyandang atas tanggagaji guru besar, sekolah rendah gred 'B'/penolong kanan, sekolah rendah gred 'A' pegawai perkhidmatan pendidikan kat C2, tingkatan khas)

Adalah saya dengan hormatnya merujuk kepada surat tuan bil SPP.z.60/1/12–43138/(30) bertarikh 16 Januari 1990 mengenai perkara di atas.

2 Dimaklumkan iaitu dalam perbicaraan kes rayuan oleh Encik Tan Chee Meng @ Tan Tek Seng di Mahkamah Tinggi, Muar pada 1 April 1990 didapati bahawa Mahkamah Tinggi telah memerintah rayuan pegawai tersebut diterima. Hukuman dan sabitan yang dikenakan ke atasnya oleh Mahkamah Sesyen Muar diketepikan dan digantikan beliau dilepaskan dengan bersyarat supaya berkelakuan baik selama tiga tahun dari tarikh 1 April 1990 di bawah s 173A(ii)(b) Kanun Keseksaan dengan ikatan bon berjumlah RM5,000 tanpa penjamin. Bersama-sama ini disertakan satu salinan fotostat perintah mahkamah daripada penolong kanan pendaftar, Mahkamah Tinggi, Muar, Criminal Appeal No 52–2–88 bertarikh 3 April 1990 untuk tatapan dan tindakan tuan selanjutnya.

Syor Pengarah Pendidikan Johor

Memandangkan pegawai tersebut telah dilepaskan oleh mahkamah dengan bersyarat supaya berkelakuan baik selama tiga tahun mulai dari 1 April 1990 dan dengan ikatan bon sebanyak RM5,000 tanpa penjamin, jabatan ini berpendapat bahawa pegawai tersebut disifatkan sebagai berkelakuan yang telah menjatuhkan reputasi perkhidmatan awam iaitu bertentangan

dengan Perintah Am 4(2)(d) Bab 'D' 1980. Kejujurannya dalam pentadbiran kewangan sekolah adalah diragukan. Pada pandangan Jabatan ini beliau tidak lagi sesuai untuk menyandang jawatan kenaikan pangkat sama ada jawatan guru besar atau penolong kanan di sekolah. Oleh kerana beliau adalah seorang pegawai yang telah ditempatkan atas tanggagaji khas untuk penyandang sebagai guru besar sekolah rendah Gred 'B'/penolong kanan sekolah rendah Gred 'A' pegawai perkhidmatan pendidikan kategori C2 tingkatan khas maka jabatan ini mengesyorkan supaya Encik Tan Chee Meng @ Tan Tek Seng diturunkan pangkat dan gajinya dari jawatan penolong kanan sekolah rendah Gred 'A' pegawai perkhidmatan pendidikan kategori C2 tingkatan khas (khas untuk penyandang) ke jawatan guru biasa pegawai perkhidmatan pendidikan bategori B1 tingkatan biasa.

Sekian, terima kasih.

'Berkhidmat untuk negara'

Saya yang menurut perintah
—tt—
(Hj Mahfor bin Baba)
Pengarah Pendidikan Johor

sk Ketua Setiausaha
Kementerian Pendidikan Malaysia
Unit Tatatertib
Bahagian Perjawatan dan Perkhidmatan
Paras 6, Blok 'J'
Pusat Bandar Damansara
50604 Kuala Lumpur

Surat tuan Bil KP.S(TT)0163/13 SJ.438(44) bertarikh 24 Mac 1990 adalah dirujuk.

Fail timbul.

The Setiausaha, Suruhanjaya Perkhidmatan Pendidikan, Malaysia in his letter dated 9 May 1990 addressed to the plaintiff via the state education director of Johor decided to dismiss the plaintiff with effect from 7 May 1990. That letter was worded in the following terms:

Urusetia
Suruhanjaya Perkhidmatan Pendidikan
(Education Service Commission)
Tingkat 21.32 and 33
Bangunan Menara Dato' Onn
Pusat Dagangan Dunia Putra
Jalan Tun Ismail
50526 Kuala Lumpur

Ruj Tuan:
Ruj Kami: SPP.Z.60/1/12-43138/(43)
Tarikh: 8 Mei 1990

Encik Tan Chee Meng @ Tan Teck Seng

Melalui dan Salinan:

Pengarah Pendidikan

Jabatan Pendidikan Johor
80604 Johor Bahru

Tuan

Tindakan tatatertib

Saya diarah menyatakan iaitu Suruhanjaya Perkhidmatan Pendidikan selaku pihak berkuasa tatatertib bagi pegawai-pegawai dalam perkhidmatan pendidikan telah menerima laporan dari ketua jabatan tuan bahawa tuan sebagai seorang pegawai yang berjawatan pegawai perkhidmatan pendidikan kategori C2 tingkatan khas (khas untuk penyandang) yang bertugas sebagai penolong kanan di Sekolah Rendah Jenis Kebangsaan (Cina) Tuan Poon Simpang Renggam, Johor telah ditangkap oleh Badan Pencegah Rasuah Johor pada 30 April 1986 dan dihadapkan ke Mahkamah Sesyen Muar, Johor pada 3 Mei 1986 atas tuduhan pecah amanah iaitu kesalahan yang boleh dihukum di bawah s 409 Kanun Keseksaan. Mahkamah Sesyen Muar, Johor pada 2 Julai 1988 telah memutuskan tuan disabitkan bersalah dan dijatuhkan hukuman penjara selama enam bulan.

2 Tuan telah mengemukakan rayuan ke Mahkamah Tinggi Muar, Johor dan mahkamah tersebut pada 1 April 1990 telah mengenepikan hukuman penjara enam bulan yang telah dijatuhkan oleh Mahkamah Sesyen Muar, Johor ke atas tuan dan Mahkamah Tinggi tersebut memutuskan tuan dikenakan ikat jamin berkelakuan baik selama tempoh tiga tahun mulai 1 April 1990 di bawah s 173A(ii)(b) Kanun Keseksaan dengan bon jaminan sebanyak RM5,000 tanpa penjamin. Dengan sabitan tersebut, tuan telah menjatuhkan reputasi perkhidmatan awam iaitu kesalahan di bawah Perintah Am 4(2)(d) Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980.

3 Setelah menimbang laporan di atas dan berdasarkan kepada Perintah Am 33 dan 35(1) Bab 'D' 1980, Suruhanjaya ini memutuskan tuan dikenakan hukuman tatatertib buang kerja berkuatkuasa mulai 7 Mei 1990.

Sekian.

Saya yang menurut perintah
—tt—
(Dato' Shahbudin bin Imam Mohamad)
Setiausaha
Suruhanjaya Perkhidmatan Pendidikan
Malaysia

The plaintiff wasted no time and wrote a letter of appeal dated 18 May 1990 to the Setiausaha, Suruhanjaya Perkhidmatan Pendidikan Malaysia imploring that the punishment in the form of dismissal be reviewed and substituted with a lesser punishment stressing particularly that the High Court, Muar, Johor had discharged him conditionally under s 173A(ii)(b) of the CPC. For convenience, the plaintiff's letter of appeal is reproduced below:

18 Mei 1990

Tan Tek Seng @ Tan Chee Meng
6 Jalan Leban
83000 Batu Pahat.

A Setiausaha
Suruhanjaya Perkhidmatan Pendidikan, Malaysia
Tingkat 21.32 dan 33
Menara Dato Onn
Pusat Dagangan Dunia Putra (PWTC)
Jalan Tun Ismail
B 50526 Kuala Lumpur.

Tuan

Per: Tindakan tatatertib buang kerja En Tan Tek Seng @ Tan Chee Meng bekas PPP kat.C2 tingkatan khas

C Surat tuan SPP.Z.60/1/12–43138/(43) bertarikh 8 Mei 1990 yang dikemukakan melalui Pengarah Pendidikan Johor adalah dirujuk.

2 Saya merasa sedih dan amat dukacita membaca surat tuan yang menyatakan bahawa saya telah dikenakan hukuman tatatertib buang kerja. Dengan ini saya ingin memohon jasa baik tuan merayu terhadap hukuman itu supaya ianya dapat diringankan berdasarkan kepada D Perintah Am 35(1) dan (2) dengan alasan seperti di bawah ini.

2.1 Adalah dirasai bahawa keputusan tuan itu amatlah berat jika dibandingkan dengan keputusan yang dijatuhkan oleh Mahkamah Tinggi, Muar. Kes saya ini telah dibebaskan dengan bersyarat dan diikat jamin supaya berkelakuan baik selama tempoh tiga tahun mengikut E s 173A(ii)(b) (tanpa rekod) aturcara Kanun Jenayah dengan bon yang berjumlah RM5,000 tanpa penjamin.

2.2 Pihak Suruhanjaya belum memberi peluang kepada saya untuk membela diri dan mendengar hujah-hujah di atas tuduhan-tuduhan yang dikenakan kepada saya.

F 2.3 Saya memohon simpati dan pertimbangan tuan kerana saya telah berkhidmat dalam bidang pendidikan lebih 32 tahun dan hampir keseluruhan umur dewasa saya telah ditumpukan sepenuhnya untuk kepentingan negara.

2.4 Saya sekarang berumur 52 tahun, sudah tua, kurang tenaga dan tiada berpeluang lagi untuk mendapatkan kerja lain jika perkhidmatan saya G ini ditamatkan.

2.5 Saya masih mempunyai tanggongan yang berat dan menanggong anak-anak bersekolah, seorang bapa yang sudah uzur yang tinggal bersama dan lebih-lebih mempunyai isteri yang tidak bekerja. Segala simpanan wang yang ada telah kehabisan kerana saya tidak mempunyai gaji sejak H 2 Julai 1988.

2.6 Rumah kediaman saya masih dalam ansuran. Saya dikehendaki membayar sebanyak RM585/sebulan kepada Malayan Banking.

2.7 Saya mengidap sakit gastrik yang teruk dan terpaksa menelan pill 'zantac' tiap-tiap hari untuk menahan kesakitan perut. Belanja satu pil I ialah dua ringgit sehari.

2.8 Saya tidak mempunyai harta benda pun untuk menjamin masa depan keluarga saya kecuali perkhidmatan saya dengan kerajaan.

2.9 Saya juga tidak lama lagi akan bersara wajib apabila genap 55 tahun dalam tahun 1993.

Dengan alasan-alasan yang dinyatakan di atas saya merayu sekali lagi agar pihak Suruhanjaya akan menimbangkan semula kes saya ini dan demi untuk mendapatkan pertimbangan peri kemanusiaan berilah peluang kepada saya untuk bernafas sebelum mengakhiri hayat saya dengan meringankan sedikit hukuman yang telah dikenakan itu. Saya penuh berharap moga-moga pertimbangan tuan itu akan diberkati dan bagi saya bagaikan 'mati akan hidup semula' dan 'Nabi Muhamad pun dapat memaafkan umatnya'.

Sekian sahaja semoga permohonan saya ini akan mendapat pertimbangan yang istimewa dari pihak Suruhanjaya.

Dengan penuh harapan,

Saya, yang benar
—tt—
Tan Chee Meng

sk

1 Ketua Setiausaha
Kementerian Pendidikan Malaysia
Bahagian Tatatertib
Paras 6, Blok 'J'
Pusat Bandar Damansara
50604 Kuala Lumpur.

2 Pengarah Pendidikan Johor
Jabatan Pendidikan Johor
80604 Johor Bahru.

This was followed by a short letter of reply from the Setiausaha, Suruhanjaya Perkhidmatan Pendidikan confirming that the dismissal was final and this letter is reproduced below for scrutiny:

Urusetia
Suruhanjaya Perkhidmatan Pendidikan
(Education Service Commission)
Tingkat 21.32 and 33
Bangunan Menara Dato' Onn
Pusat Dagangan Dunia Putra
Jalan Tun Ismail
50526 Kuala Lumpur

Ruj Tuan:
Ruj Kami: SPP.Z.60/1/12-43138/(49)
Tarikh: 28 Mei 1990

Encik Tan Chee Meng @ Tan Tek Seng
No 6 Jalan Leban
83000 Batu Pahat
Johor

Tuan

Tindakan tatatertib

Adalah saya merujuk kepada surat tuan bertarikh 18 Mei 1990 dan dimaklumkan bahawa keputusan Suruhanjaya ini yang disampaikan melalui surat dalam kandungan SPP.Z.60/1/12–43138/(43) bertarikh 8 Mei 1990 adalah muktamad.

Sekian.

Saya yang menurut perintah
—tt—
(Hj Othman bin Hj Ismail)
bp Setiausaha
Suruhanjaya Perkhidmatan Pendidikan
Malaysia.

sk

Ketua Setiausaha
Kementerian Pendidikan Malaysia
Unit Tatatertib
Paras 6, Blok 'J'
Pusat Bandar Damansara
50604 Kuala Lumpur.

Pengarah Pendidikan
Jabatan Pendidikan Johor
80604 Johor Bahru

(Fail tuan: JPNJ/FP.SULIT 68254)

At the outset, both parties agreed that there was only one issue which would decide the whole case without having to call witnesses. That issue is this: whether the binding order made by the High Court, Muar, Johor under s 173A(ii)(b) of the CPC could be construed as a 'conviction' under paras 3, 33 and 35 of the Public Officers (Conduct And Discipline) (Chapter 'D') General Orders 1980 ('GO') and, if the reply was in the positive, the dismissal was said to be perfectly legitimate and effected according to law.

The word 'conviction' is not defined in the CPC, but it is defined in the GO to include a finding or an order involving a finding of guilt by a criminal court in Malaysia. The provisions of sub-s (ii)(b) of s 173A of the CPC which are pertinent to the matter now under consideration are reproduced below:

> When any person is charged before the Court with an offence punishable by such Court, and *the Court finds that the charge is proved*, but is of opinion that, having regard, to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to release the offender on probation, *the Court may, without proceeding to record a conviction*, make an order either —
>
> ...
>
> (b) discharging the offender conditionally on his entering into a bond with or without sureties, to be of good behaviour and to appear for the conviction to be recorded and for sentence when called upon at any time during such period, not exceeding three years, as may be specified in the order. (Emphasis added.)

The essential prerequisites for the application of s 173A(ii)(b) of the CPC can conveniently be summarized as follows:

(a) applicable to all offenders irrespective of age;

(b) where the court finds that the charge is proved;

(c) but inclined not to record the conviction;

(d) and consideration has to be given to the character, antecedents, age, health, mental condition of the offender, the trivial nature of the offence, and any extenuating circumstances of the offence;

(e) where it is inexpedient to inflict any punishment or any other than a nominal punishment; and

(f) the bond period shall not exceed three years.

It is now necessary to cite a few cases to show the judicial thinking of some of the judges before me on s 173A of the CPC.

Thomson J (as he then was) in *PP v Idris* [1955] MLJ 234 had this to say of s 173A of the CPC [at p 235]:

> Section 173A is applicable in all cases triable in the magistrates' court irrespective of the nature of the prescribed punishment and it is to be observed that where it is proposed to exercise the powers given by it, the court should not proceed to conviction.

Ali J (as he then was) in *PP v Onn* [1969] 1 MLJ 4 was more direct and to the point. His Lordship said, 'Section 173A is clear in terms that when power is to be exercised the court shall not proceed to conviction.'

On the same page, his Lordship continued further and this is the crucial part:

> Since sentence follows conviction it must, therefore, be the intention of the Legislature that whenever a bond is ordered under this section, nothing which savours of a form of punishment should be inflicted upon the offender. A condition requiring the offender to be of good behaviour in para (b) has no punitive effect in as much as it merely enjoins the offender to behave like any other law-abiding citizen.

Abdoolcader J (as he then was) in *PP v Yeong Yin Choy* [1976] 2 MLJ 267 had good things to say about s 173A of the CPC. This was what he said [at p 269 col 2C–D):

> I would think that the essential difference in the application of the provisions of s 294 and s 173A of the Code is that the latter is normally intended to be utilised in cases of minor import and calling for exceptionally mild treatment affecting adult and youthful offenders alike where the nature of the offence, the extenuating circumstances of the case and factors peculiar to the offender in question justify and perhaps even require that no conviction be recorded against him, so that although he is either admonished or cautioned or discharged conditionally as provided therein there remains no blemish or stain against him by reason of a conviction being recorded.

It is patently clear from the authorities cited above that a binding over under s 173A(ii)(b) of the CPC does not carry with it the stigma of being a criminal. But all the same the court in proceeding to award the binding over under s 173A(ii)(b) of the CPC must first find that the charge is proved. It is this point that has been seriously canvassed before me by Encik Abdul Rashid bin Hj Daud, the learned senior federal counsel for

A the defendants. He says that I am breaking new ground and that the requirement that the court must first find that the charge is proved under s 173A(ii)(b) of the CPC means that the plaintiff was found guilty by the High Court, Muar, Johor. Indeed that was an illuminating submission.

Now, s 173A(ii)(b) of the CPC envisages a situation where the B charge against an offender has been proved before the court trying him and that court must make a finding to that effect. But before the court proceeds to sentencing, the offender's background, particularly 'the character, antecedents, age, health or mental condition of the person charged, or ... the trivial nature of the offence, or ... the extenuating circumstances under which the offence was committed' will have to be taken into account C singularly or jointly. It is only at this stage that the court will then proceed to the next step and this is to bind the offender for good behaviour for a period not exceeding three years with or without sureties. It is within this period not exceeding three years that the offender must behave himself otherwise he would be called upon at any time for the conviction to be D recorded and for sentencing forthwith.

Paragraph 3 of the GO defines 'conviction' to include 'a finding or an order involving a finding of guilt by a criminal court in Malaysia'. That the court must first find that the charge has been proved would necessarily mean that there must also be a concurrent finding of guilt. This must E surely be the interpretation to be attached to s 173A(ii)(b) of the CPC. To construe otherwise would fly in the face of the clear words in that section, viz 'the Court may, without proceeding to record a conviction' make an order to discharge the offender conditionally. I am reminded, at this juncture, of what Viscount Simonds said in *Kirkness v John Hudson & Co Ltd* [1955] AC 696 at p 712; [1955] 2 All ER 345 at p 351; [1955] 3 WLR F 1135 at p 1142 to the effect that if a judge 'forms his own clear judgment and does not think that the words are "fairly and equally open to diverse meanings" he is not entitled to say that there is an ambiguity'. Since the word 'conviction' is defined in the GO, it must be understood in that stipulated sense (see for example *R v Britton* [1967] 2 QB 51; [1967] 1 All G ER 486; [1967] 2 WLR 537). In my judgment, the word 'conviction' in para 3 of the GO is defined in simple terms without bringing in other terms which need definitions of their own. It is a clarifying definition because it is drafted in such a way so as to avoid doubt as to whether the word does or does not include specified matters. As Viscount Dilhorne said: 'It is a familiar device of a draftsman to state expressly that certain H matters are to be treated as coming within a definition to avoid argument on whether they did or not' (see *IRC v Parker* [1966] AC 141 at p 161; [1966] 1 All ER 399 at p 404; [1966] 3 WLR 486 at p 494).

It must be emphasized that *PP v Idris*, *PP v Onn*, and *PP v Yeong Yin Choy* did not consider s 173A(ii)(b) of the CPC in the context of the GO I and it is this difference that distinguished those cases with the facts of the present case.

The plaintiff in *Zainal bin Hashim v Mohamed Haniff bin Omar & Anor* [1975] 2 MLJ 262 joined the service in the Police Force in 1962. On

29 April 1971 he was charged in the Magistrates' Court, Kajang for an offence under s 353 of the Penal Code (FMS Cap 45) for which he pleaded guilty. He was discharged conditionally upon his entering into a bond in the sum of RM500 for a period of two years under s 173A(ii)(b) of the CPC. At the material time, the plaintiff was serving in Kajang as police constable No 31209. On 20 December 1971, Mr SW Moreira, Deputy Chief Police Officer, Selangor in his letter addressed to and served upon the plaintiff, suspended the plaintiff's service with effect from 16 December 1971, the date the plaintiff was found guilty in the Magistrates' Court at Kajang. Mr Moreira who wrote for and on behalf of the Chief Police Officer, Selangor stated that as the plaintiff was found guilty of the charge under s 353 of the Penal Code at the lower court, Kajang on 16 December 1971 and was ordered to execute a bond in the sum of RM500 to be of good behaviour for two years under s 173A of the CPC, he (the plaintiff) was therefore suspended from duties without pay with effect from 16 December 1971. At the time the plaintiff was suspended from service he was on the permanent and pensionable establishment drawing a salary of RM230 per month with RM10 increment per annum and a Tamil language allowance of RM15 per month. Subsequent to the letter of suspension the plaintiff was, on 28 December 1971 served with a dismissal notice signed by the Chief Police Officer, Selangor. The plaintiff submitted representations but he was dismissed without being given an oral hearing. The plaintiff then brought an action for a declaration that his dismissal was void and inoperative on the ground that as the Chief Police Officer had no power to appoint constables, dismissal of a constable by him contravened art 135(1) of the Federal Constitution. Abdul Hamid J (as his Lordship then was) found in favour of the plaintiff.

Subsequently, the Federal Constitution was amended by adding a proviso that cl (1) of art 135 shall not apply to a case where a member of the public services is dismissed or reduced in rank by an authority in pursuance of a power delegated to it by a Commission and it was provided that the proviso 'shall be deemed to have been an integral part of this clause as from Merdeka Day'. The Government of Malaysia appealed to the Federal Court and the Federal Court held that the proviso operated to validate the plaintiff's dismissal [1977] 2 MLJ 254. The plaintiff appealed from that decision. The Privy Council [1979] 2 MLJ 276 in dismissing the appeal and affirming the Federal Court's decision held, inter alia, that the legislature clearly intended to give retrospective effect to the amendment and to secure that no action started after Merdeka Day, whether proceeding or not started when the amendment was made, should succeed on the ground that the power to dismiss had not been exercised by someone with power to appoint. It made no difference that the action started had got to the stage of judgment being given and was under appeal when the amendment was made. The Federal Court therefore rightly allowed the appeal from the High Court on this ground.

On the facts, *Zainal bin Hashim v Mohamed Haniff bin Omar & Anor* were almost on all fours with the present case. There the plaintiff/appellant

had pleaded guilty under s 353 of the Penal Code in his capacity as a police constable and was discharged conditionally upon his entering into a bond in the sum of RM500 for a period of two years under s 173A(ii)(b) of the CPC. Here, the plaintiff was charged on two counts under s 409 of the Penal Code before the Sessions Court, Muar, Johor and was tried (not clear from the agreed bundles 'A' and 'B'), and sentenced to six months' imprisonment. It was only on appeal before the High Court, Muar, Johor that the plaintiff was discharged conditionally upon his entering into a bond in the sum of RM5,000 without sureties for a period of three years under s 173A(ii)(b) of the CPC.

In *Zainal bin Hashim v Mohamed Haniff bin Omar & Anor*, the dismissal notice signed by the Chief Police Officer, Selangor to the plaintiff was in the following terms:

> I am hereby directed to inform you that I intend to take an action to dismiss you from the Royal Malaysian Police Force *for having been found guilty of a charge at the lower court, Kajang* on 16 December 1971 *and for having been ordered to execute a bond of good behaviour for a period of two years under s 173A(ii)(b) Criminal Procedure Code.*
>
> You are therefore given the opportunity to make any representation in respect of the above matter within a period of 14 days with effect from the date of receipt of this letter.
>
> Your representation should be in writing addressed to me.
>
> —Sgd—
> Mohd Haniff bin Omar
> Chief Police Officer
> Selangor

The words employed by the chief police officer like '... for having been found guilty of a charge at the lower court, Kajang ...' when contrasted with the words employed by the State Education Director of Johor in the letter dated 10 April 1990 to the Setiausaha Suruhanjaya Perkhidmatan Pendidikan, Kuala Lumpur as reproduced in the early part of this judgment especially words like 'Hukuman dan sabitan yang dikenakan ke atasnya oleh Mahkamah Sesyen Muar ...' gave the impressions, rightly so, that the plaintiffs in both these cases were convicted accordingly. Of pertinence and what Encik T Balaskanda for the plaintiff submitted was his exception to the use of words 'Dengan sabitan tersebut ...' in reference to the binding over under s 173A(ii)(b) of the CPC in the letter of the Setiausaha, Suruhanjaya Perkhidmatan Pendidikan, Malaysia addressed to the plaintiff through the State Education Director of Johor. He submitted that if those words were the basis for the dismissal of the plaintiff then such dismissal was clearly wrong because the facts were misinterpreted.

It appears and it is the basis of Encik Abdul Rashid Hj Daud's submission that once the High Court, Muar, Johor finds that the charge is proved then the defendants are entitled to proceed under paras 33 and 35 of the GO. It is also his case that the order of the High Court, Muar, Johor creates a situation whereby para 4(2)(d) of the GO can be invoked.

For ease of reference, paras 33 and 35 of the GO are reproduced below:

> 33 Procedure in case of conviction
>
> Where criminal proceedings against an officer result in his conviction, or where his appeal against his conviction has been dismissed, the Head of Department concerned shall apply to the Registrar or Senior Assistant Registrar of the relevant Court for a copy of the judgement of the Court. Upon receipt of the said judgement, the Head of Department shall submit the same to the Appropriate Disciplinary Authority together with full particulars of the officer's past record of service and recommendation of the Head of Department as to whether the officer should be dismissed from the service or otherwise dealt with depending on the nature and gravity of the offence committed in relation to the degree of disrepute which it brings to the service.
>
> 35(1) Power of Disciplinary Authority in cases of conviction, detention, etc
>
> Notwithstanding anything in General Order 23, if after considering the report and documents submitted by the Head of Department in General Orders 33 and 34(1), the Appropriate Disciplinary Authority is of the opinion that the officer merits dismissal or reduction in rank, it may forthwith direct accordingly, or if it is of the opinion that the officer should be inflicted with a lesser punishment or otherwise dealt with, the Disciplinary Authority may forthwith inflict upon the officer such lesser punishment or deal with him in such manner as it may deem fit.
>
> (2) If as a result of the lesser punishment the officer is not dismissed, the question of his emoluments during the period of his suspension shall be at the discretion of the Director General of Public Services.

For expediency, para 4(2)(d) of the GO is reproduced herewith:

> Conduct himself in such manner as to bring the public service into disrepute or to bring discredit thereto.

In my judgment, a finding that the charge was proved under s 173A(ii)(b) of the CPC was tantamount to a finding of guilt but the court would not be inclined to record a conviction before binding over the plaintiff conditionally thereto. And since there was a finding of guilt, it would squarely fall within the ambit of the definition of the word 'conviction' in para 3 of the GO and, consequently, the Setiausaha, Suruhanjaya Perkhidmatan Pendidikan, Malaysia was correct when he decided to dismiss the plaintiff. The dismissal against the plaintiff was part and parcel of the several forms of punishment as stipulated in para 36 of the GO.

Incidentally, his Lordship Abdul Hamid J (as he then was) in *Zainal bin Hashim v Mohamed Haniff bin Omar & Anor* described the plaintiff there as having been found guilty of a charge under s 353 of the Penal Code and was bound over under s 173A(ii)(b) of the CPC, a situation akin to that of the present case. Though the issue raised in the present case was not ventilated in *Zainal bin Hashim v Mohamed Haniff bin Omar & Anor*

[1979] 2 MLJ 276, yet Viscount Dilhorne in his judgment set out the facts in this manner:

> The appellant was appointed a police constable in the Royal Malaysian Police Force on 1 March 1962. In 1971 he was charged with an offence under s 353 of the Penal Code of Malaysia. To that charge he pleaded guilty and he was discharged conditionally upon his entering into a bond in the sum of RM500 for a period of two years. On 22 December 1971 he received notice by letter dated 20 December, that he was suspended from duty with effect from 16 December 1971, the date on which he had pleaded guilty, *on account of his conviction on that charge.*
>
> On 28 December 1971 the Chief Police Officer at Selangor wrote to the appellant saying that he intended to take action to dismiss the appellant from the Royal Malaysian Police *on account of his conviction* and telling him that he could make any representations with regard thereto in writing within fourteen days. [Emphasis added.]

The use of the words 'on account of his conviction on that charge' by Viscount Dilhorne to describe the plaintiff/appellant there who was bound over under s 173A(ii)(b) of the CPC was intentional and reflective that before a binding over under that section was imposed the individual must have been found guilty and convicted thereof. Likewise, in the instant case, the plaintiff must have been found guilty and convicted before he was bound over under s 173A(ii)(b) of the CPC and at this stage of binding over, the conviction was not recorded so as to give the plaintiff the chance to turn over a new leaf. The word 'conviction' is defined in para 3 of the GO restrictively and is confined to a finding of guilt without a conviction being recorded. Thus, as stated earlier, before the finding of guilt is arrived at there must first be a finding that the charge has been proved. That finding of guilt under s 409 of the Penal Code was tantamount to the plaintiff conducting 'himself in such manner as to bring the public service into disrepute or to bring discredit thereto' (see para 4(2)(d) of the GO). This must surely be the thinking behind the dismissal of the plaintiff.

It is germane to mention that the words emphasized in para (a) of cl (2) of art 135 of the Federal Constitution and reproduced below:

> No member of such service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:
>
> Provided that this Clause shall not apply to the following cases:
>
> (a) where a member of such a service is dismissed or reduced in rank on the ground of conduct *in respect of which a criminal charge has been proved against him.*

are identical to the words italicized and employed in s 173A(ii) of the CPC which reads as follows, 'When any person is charged before the Court with an offence punishable by such Court, *and the Court finds that the charge is proved*', and, consequently, the question of dismissal 'without being given a reasonable opportunity of being heard' does not arise. This is also the case for the dismissal of the plaintiff in the instant case when the Setiausaha, Suruhanjaya Perkhidmatan Pendidikan, Malaysia resorted to paras 33 and

35 in dismissing him. The italicized words in para (a) of cl (2) of art 135 of the Federal Constitution patently show the attitude of the Government through the supreme law of the country to dismiss a member of the public service 'on the ground of conduct in respect of which a criminal charge has been proved against him'. There appears to be no necessity for the court to record a conviction before the plaintiff can be dismissed 'on the ground of conduct' or by conducting 'himself in such manner as to bring the public service into disrepute or to bring discredit thereto'.

For the reasons adumbrated above, the question the posed would be answered in the positive and, consequently, the dismissal of the plaintiff was perfectly legitimate and effected according to law.

Claim dismissed.

Reported by Kevin Ooi